IN THE HIGH COURT OF DELHI

FAO.No.338/2005

S.P.Chand ..... Appellant
! through: Mr.Sandeep Sharma, Advocate

VERSUS

$ Din Cooperative Group Housing Society Ltd. ..... Respondent
^ through: Mr.Sanjiv Gupta, Advocate

% DATE OF DECISION: 17.12.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**

1. Appellant was awarded the work of external electrification and erection of sub-station at the plot allotted to the respondent society. The work was awarded pursuant to a tender floated by the society. The tender documents were as framed by the society. In terms of the tender documents formal agreement was executed between the parties on 26.6.1998. Clause 4 whereof reads as under :-

> "4. The written plans, agreement and documents above mentioned shall form the basis of this contract and the decision of the

> said Archgitects or employer for the time being as mentioned in the conditions of the contract in reference to all matters of disputes as to the material, workmanship or account and as to the intened interpretation or the clause of this agreement to any other documents attached hereto shall be final and binding on both the parties and may be made a Rule of Court."

2. According to the contractor, having successfully completed the work and final bill being certified for payment notwithstanding cheque No.484239 dated 30.3.2000 in sum of Rs.11,12,886/- being issued, the society did not make available the requisite funds with the bank resulting in the cheque being dishonoured. The contractor's pleas to the society to make good the said payment and also return the security deposit was not accepted by the society necessitating invocation of the clause afore-noted which according to the contractor constitutes a valid and a binding arbitration agreement between the parties.

3. It is not in dispute that the society engaged Aggarwal Arora Architects Pvt.Ltd. as their architect. The contractor wrote a letter to Aggarwal Arora Architects Pvt.Ltd. with a copy to the society calling upon that reference be entered into as an arbitrator. Mr.B.D.Arora, Managing Director of the architect entered upon reference and vide letter dated 6.2.2002 directed the contractor to file statement of claims with copy to the society. The date notified for hearing

was 8.3.2002. On said date society took time to file reply. Next date notified was 24.4.2002. Yet again adjournment was sought by the society. Matter was adjourned for 19.6.2002 on which date yet again an adjournment was sought and was granted. Matter was adjourned to 29.7.2002. Another adjournment was sought and was granted. Matter was adjourned to 16.9.2002. On said date none appeared for the society. Learned arbitrator adjourned the matter for 25.9.2002. On a telephonic request from the Vice President of the society hearing was adjourned to 30.9.2002. None appeared for the society. Learned arbitrator adjourned the matter. He notified on 17.1.2003 to the society for the reason society had written a letter to him informing that the office bearers were busy with the audit. On said date matter was once again got adjourned to 12.2.2003 and therefrom to 25.2.2003, further down to 9.4.2003, and therefrom to 24.6.2003 for the reason in the interregnum an application was filed by the society under Section 16 of the Arbitration & Conciliation Act. Objection was that the relevant clause did not constitute an arbitration clause. As a limb to the main submission it was urged that a juristic person cannot function as an arbitrator.

4. Learned arbitrator dismissed the said application on

15.7.2003 and notified 30.7.2003 as the last date by which reply had to be filed. On 30.7.2003 counsel for the society sought an adjournment. He stated that the society wanted to challenge the order passed by the learned arbitrator dismissing the application under Section 16 of Arbitration & Conciliation Act. Learned arbitrator informed the counsel for the society that the said order could not be challenged at the interim stage of the arbitration proceedings and the society had to await the award. Yet inspite thereof the society chose not to file a response to the claim petition. The society chose to absent itself from further hearings resulting in award being published on 18.8.2003.

5. In the award learned arbitrator has awarded Rs.11.12,886/- the amount covered by the dishonoured cheque as also the refund of security deposit in sum of Rs.1,00,000/- and money deducted from the running bills in sum of Rs.2,58,140/-. Interest @ 12% per annum has been allowed on both the claims allowed.

6. The society filed objections to the award inter alia alleging that the clause in question does not constitute an arbitration clause. Alternatively it was submitted that a juristic person cannot act as an arbitrator.

7. Learned Judge who considered the objections of the

society has concurred.

8. The contractor is in an appeal under Section 37 of the Arbitration & Conciliation Act,1996.

9. In respect of the first ground held in favour of the society by the learned Judge, I note the decision of the Supreme Court reported as 2003 (3) Arb.LR 579 *Mallikarjun V. Gulbarga University*. Clause 30 of the agreement which was considered by their Lordships of the Supreme Court reads as under :-

> "The decision of the Superintending Engineer of the Gulbarga Circle for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or material used on the work, or as to any other question, claim, right, matter, or thing whatsoever, in any way arising out of, or relating to the contract, designs, drawings, specifications, estimate, instructions, orders or those conditions, or otherwise concerning the works or the execution, or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof in case of dispute arising between the contractor and Gulbarga University."

10. It was held that the clause was sufficiently worded to be interpreted as an arbitration clause.

11. I need note no further other than to record that clause 4 of the arbitration between the parties is worded in language fairly akin to clause 30 of the agreement which was

subject matter of the decision in *Mallikarjun*'s case.

12. Thus, objection taken that the clause in question does not constitute a valid arbitration clause is over ruled.

13. Pertaining to the second objection, suffice would it be to note that the architect has been appointed by the society. Clause 3 of the agreement between the parties reads as under :-

> "3. The term "Architect/Consultants" in the said conditions shall mean the said M/s Aggarwal Arora Architects (P) Ltd. or in the event of their death or ceasing to be the Architects for the purpose of this contract, such other person as shall be nominated for that purpose by the employer, not being a person to whom the contractor shall object for reason considered to be sufficiently appointed to be Architects under this contract shall be entitled to disregard or over-rule any decision or approval or direction given or expressed in writing by the Architects for the time being."

14. The contra preferential rules may come into force. The society which is the author of the document must suffer the consequences of vagueness in the contract. That apart, the society chose to make its architect as the arbitrator. The architect happens to be a private limited company. Thus, the company had to act through a live human being. The arbitrator could not be other than the managing director thereof.

15. In my opinion it does not lie in the mouth of the

society to turn around and challenge the award on technicalities which has been published by its own architect.

16. In equity, I may note that claim No.1 pertained to the dishonoured cheque which the society has issued. Claim No.2 related to the return of earnest money and security deposit deducted from the running bills.

17. Indeed, the contractor proved entitlement.

18. Interest awarded @ 12% p.a. is fair and reasonable.

19. I allow the appeal. The impugned order dated 7.9.2005 is set aside. Appellant would be entitled to costs in sum of Rs.10,000/- against the respondent.

December 17, 2007 **PRADEEP NANDRAJOG, J.**
pu